

LA RO LUMBER COMPANY, INC.

IBLA 76-714

Decided May 20, 1977

Appeal from decision of BLM District Manager, Salem, Oregon, denying request for adjustment of purchase price of timber sale contract No. 36080! TS4-166.

Affirmed.

1. Timber Sales and Disposals

Where a purchaser in a timber sale contract alleges that there is a discrepancy between the volume of timber estimated by the Bureau of Land Management and the volume removed by the purchaser, the shortage may be explained by the fact that BLM's cruising and scaling standards are substantially different from those used by the Columbia River Log Scaling and Grading Bureau which estimated the volume recovered by the purchaser.

2. Timber Sales and Disposals

A timber sale is a lump sum sale where the purchase price is not contingent on the volume of timber to be recovered. Where the timber sale contract specifically disclaims warranties of quantity and quality, the purchaser may not recover for an alleged shortage in the volume on the theory that the government was negligent in estimating the volume of timber, or that there was a mutual mistake in fact in regard to the volume, or that such disclaimers are unconscionable.

APPEARANCES: Douglas B. Dawson, Esq., Dallas, Oregon, for appellant; Donald P. Lawton, Esq., Office of the Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

# OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

La Ro Lumber Company appeals from a decision of the Bureau of Land Management District Manager, Salem, Oregon, dated June 28, 1976, in which the company's request for adjustment of the purchase price of timber sale contract No. 36080! TS4-166 was denied as was its request for a refund of monies paid under the contract. Appellant's May 13, 1976, claim for modification of the contract was based on the fact that the Bureau of Land Management's (BLM) merchantable scale representation in the contract and prospectus was 1,224,000 board feet while appellant removed only 629,350 board feet in merchantable logs. Appellant contends that BLM misrepresented the difference of 594,650 board feet resulting in an overpayment by La Ro of \$ 128,396.25 on the contract. 1/

In its statement of reasons appellant points to section 7 of the contract which provides:

Nothing herein shall be construed to relieve either party from liability for any breach of contract or any wrongful or negligent act.

It claims that the BLM's negligence arises from the fact that the difference between the merchantable scale representation by BLM and the actual merchantable logs removed comes about because many of the large trees located on the sale proved to be rotten and non! merchantable when cut.

Appellant claims restitution on the grounds of mutual mistake. It asserts that there was no practical way an experienced forester would have been able to tell prior to buying the sale that the large trees were in such bad condition. Appellant explains that the "conch" and related scarring had long since fallen off so the trees appeared normal. Thus, reasons appellant, the rotten trees in all probability were not contemplated either by BLM or by appellant in calculating, through cruise reports, the potential volume of the sale. Citing 50 ALR 3d 1188, appellant states that the materiality of the mutual

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1/ The total overpayment on the contract was \$ 133,796.25, but BLM decreased the purchase price by \$ 5,400.00 on November 4, 1975, because certain trees were marked and sold which were not owned by the Government and others were cut and removed by an unknown party.

mistake rests with whether or not the parties would have so contracted had they known the true facts. Appellant emphatically answers in the negative and assumes BLM's answer would be the same.

Appellant asserts that BLM's disclaimer of warranty is unconscionable in this case because Oregon law treats sales of standing timber as coming within the sales provisions of the Uniform Commercial Code. Oregon Revised Statutes 72.1070(2). Therefore, appellant believes that the unconscionable contract provisions of the Uniform Commercial Code also apply. Oregon Revised Statutes 72.3020. Appellant contends that the implied warranty of merchantability and of fitness for a particular purpose represented by the BLM estimate should render the express disclaimer unconscionable and the contract of adhesion voidable and subject to the elements of restitution.

In response, BLM explained that the shortage of volume reported by appellant was due to the fact that BLM's cruising and scaling standards are substantially different from those used by the Columbia River Log Scaling and Grading Bureau which estimated the volume recovered by appellant. BLM illustrated the extent of the difference by comparing specific Columbia River Scale Standards with BLM cruise scale standards. For example, BLM measures the diameter of all logs to the nearest inch (Bureau of Land Management Manual, Oregon State Office Supplement, June 5, 1975, 5321.53 F [Exhibit C]) while the Columbia River Scale drops any fraction over an inch (Official Log Scaling and Grading Rules for the Columbia River Log Scaling and Grading Bureau, July 1, 1972, p. 6 [Exhibit B]); BLM scales logs in 1! foot increments of length while (except for certain peeler lengths) the Columbia River scales measure lengths in 2! foot increments. Thus, BLM scale considers all of the material in the log while the Columbia River scale penalizes logs having odd lengths. (See Ex. B, p. 6-7 and Ex. C, 5321.51.) Logs over 20 feet in length are scaled as two or more logs by BLM while the Columbia River Cruise does not scale a log as two or more logs unless it is at least 42 feet in length (Ex. B, p. 7, Ex. C, 5321.32). When the Columbia River scaler measures a 40! foot log, he will apply the diameter at the small end of the log to the entire log (Ex. B., p. 6). BLM, recognizing that a tree has a natural taper with the lower end larger than the upper end, measures the diameter of a 40! foot log at both ends and breaks the log into two logs of differing diameters, thus reflecting a substantial portion of the volume contained in the long taper (Ex. C, 5321.32). BLM offered these examples to show that BLM scaling standards tend to favor the seller, thus accounting for the appellant's claimed shortage in volume which was estimated using the Columbia River scaling standards.

Also, BLM emphasized that appellant should not be able to recover because the Government expressly disclaimed warranties of

fitness, quantity and quality, and stressed that the contract is for a lump sum and not dependent upon the amount of timber recovered. Therefore, BLM concluded that appellant's obligation to pay the full purchase price of the contract cannot be avoided by claiming that the contract was unconscionable or that a mutual mistake of fact had been made.

[1] At the outset, we note that appellant, in its request for modification of its contract, claimed that the volume of timber was 48 percent short. BLM was unable to discover an error in its cruise or computation. The Salem District Cruiser Appraiser, Karl F. Remmy, submitted an affidavit to verify BLM's contention that no error had been made. We find that the reason for the discrepancy between BLM's estimate and appellant's estimate, as explained by BLM, is that BLM's cruising and scaling standards differ from those used by the Columbia River Log Scaling and Grading Bureau which estimated the volume recovered by appellant. The Government averred that the BLM standards are well understood within the industry; this was not contradicted by appellant nor did appellant allege it had not understood the BLM standards.

[2] We disagree with appellant's contention that BLM was negligent because many of the large trees located on the sale were rotten when cut. Negligence implies a breach of duty. The contract between appellant and BLM was for a lump sum and not dependent upon the amount of timber recovered. John D. Huffman, 7 IBLA 190, 79 I.D. 567 (1972). Therefore, BLM was under no duty to insure the quantity and quality of all timber. On the contrary, in section 6 of the contract BLM specifically disclaims warranties of quality and quantity of timber.

Neither can it be said that appellant is entitled to restitution based on mutual mistakes in the contract. A similar argument was presented in Lloyd L. Clark, 17 IBLA 201 (1974), in which appellant contended that because of an alleged error as to estimated quantity, there was no meeting of the minds and therefore no binding contract. In that case the Board found that because of Government disclaimer, the risk as to the quantity of merchantable lumber would ordinarily be considered to have been assumed by appellant as one of the elements of the bargain. The Board cited Restatement of Contracts, section 502 comment which states:

Where the parties know that there is doubt in regard to a certain matter and contract on that assumption, the contract is not rendered voidable because one is disappointed in the hope that the facts accord with his wishes. The risk of the existence of the doubtful fact is then assumed as one of the elements of the bargain.

BLM made it clear that there was doubt in regard to the quantity of timber, and warned appellant that the purchaser would be responsible for the total contract price. The Timber Sale Notice contained a provision stating that the purchaser shall be liable for the total purchase price without regard to the amount bid per unit, even though the quantity of timber actually cut or removed or designated for taking is more or less than the estimated volume or quantity so listed. BLM has consistently warned its timber purchasers not to rely upon the estimates of volume which it makes for its own administrative purposes. In this regard Section 6 of the appellant's contract specifically provides that:

Inspection of Timber and Disclaimer of Warranty

(a) Purchaser warrants that this contract is accepted and executed on the basis of its examination and inspection of the timber sold under this contract and its opinion of the value thereof.

(b) Government expressly disclaims any warranty of fitness of the timber for any purpose; all timber sold hereunder is accepted As Is without any warranty of merchantability by Government. Any warranty as to the quantity or quality of the timber sold hereunder is expressly disclaimed by Government. Refund to or recovery by Purchaser for failure of title to any timber sold hereunder shall not exceed the value of such timber computed at prices per unit for species involved as set forth in Exhibit B.

In Exhibit B of the appellant's contract where the Bureau's estimates of volume do appear these estimates are preceded by a disclaimer which provides that:

The following estimates and calculations of value of timber sold are made solely as an administrative aid for determining: (1) adjustments made or credits given in accordance with Secs. 6, 9, or 11; (2) when payments are due; and (3) value of timber subject to any special bonding provisions. Except as provided in Sec. 2, Purchaser shall be liable for total purchase price even though quantity of timber actually cut or removed or designated for taking is less than the estimated volume or quantity shown. Cutting areas are shown on Exhibit A.

Also, departmental regulation 43 CFR 5461.3 provides in part:

For a cruise sale the purchaser shall not be entitled to a refund even though the amount of timber cut, removed, or designated for cutting may be less than the estimated total volume shown in the contract. \* \* \*

Furthermore, directly above the signature of the appellant's authorized corporate officer on bid confirmation Form 5440-9 is the statement that:

If timber sale contract is executed, undersigned is liable for total purchase price even though the quantity of timber cut, removed, or designated for taking is more or less than the total estimated volume or quantity shown above. Undersigned certifies bid was arrived at by bidder or offeror independently, and was tendered without collusion with any other bidder or officer. In submitting or confirming this bid, undersigned agrees to the foregoing provisions, applicable regulations, and certifies that he is authorized to act as, or on behalf of, the bidder.

Appellant, therefore, was definitely on notice that the amount of timber was an uncertain element of the contract, as well as aware that it was responsible for the full purchase price even though the quantity of timber recovered was less than BLM's estimate.

Neither do we find that BLM's disclaimer of warranty as to quantity is unconscionable. Even if the Oregon statute did apply to BLM timber sale contracts, the Board found in John D. Huffman, supra, that the disclaimer of warranty was not unconscionable and noted at 196:

In the comment to the Code provision on unconscionable contracts set out above, the Editorial Board stated that the test to be applied in using that provision to be one of whether [footnotes omitted]:

\* \* \* In light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. \* \* \* The principle is one of prevention of oppression and unfair surprise \* \* \* and not of disturbance of allocation of risk because of superior power.

Thus, the standard is one of "oppression and unfair surprise", with the needs of the particular trade and its commercial background being the primary evidence. Appellant is, as pointed out by his own brief, a logger of many years' experience. Therefore, he can hardly claim surprise

in the methods and practices used by the BLM in conducting timber sales. In addition, as pointed out in the comment above, the unconscionability clause is not to be used to alter the risk inherent in any sales situation due to differences in bargaining power.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques  
Administrative Judge

We concur:

Martin Ritvo  
Administrative Judge

Joseph W. Goss  
Administrative Judge

